FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 11 1907
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1906.

No. 227.

BEHN, MEYER & COMPANY, *Plaintiffs in Error.*

vs.

CAMPBELL & GO-TAUCO.

MEMORANDUM IN REPLY IN BEHALF OF THE PLAINTIFFS IN ERROR.

HENRY E. DAVIS,
For the Plaintiffs in Error.

IN THE

Supreme Court of the United States

October Term, 1906.

No. 227.

BEHN, MEYER & COMPANY, *Plaintiffs in Error.*

vs.

CAMPBELL & GO-TAUCO.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MEMORANDUM IN REPLY IN BEHALF OF THE PLAINTIFFS IN ERROR.

It is contended in behalf of the defendants in error, in seeming seriousness, that the plaintiffs in error are bound as to the measurements of the quantity of sand used in filling the lot belonging to the plaintiffs in error by Section 1598 of the Philippines Civil Code and the rulings of this Court to the effect that, where parties to a contract have agreed upon some third person to determine the amount of labor done or materials furnished under a contract, the determination of such third person as to quantities and amounts is conclusive on the parties in the ab-

sence of fraud or of such gross error as to imply bad faith.

The principle invoked is readily conceded, but that it has no application to the case at bar is plain, upon the most cursory view of the facts.

The Section of the Civil Code relied on merely provides for the application to a given case of the principle, which is as follows: Where parties to a contract for given work stipulate in the contract that payments are to be made on the certificate of a third person, whose determination as to quantities and amounts shall be conclusive, the parties will be held bound by such provision of the contract, in the absence of fraud, or of such gross error as to imply bad faith. This principle has received the repeated sanction of this court, and, in a proper case, is conclusive of any controversy between parties to a contract.

But this case does not call for, or admit of, the application of this principle. The contract between the parties (Rec. 7-8, 97) provides as to the measurement of the sand, as follows:

> "Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Company, deem most expedient."

The contract will be read in vain to discover therein the designation of any third person by whose measurements the parties, or either of them, agree to be bound; and the testimony shows that there was no such third person.

Campbell, one of the defendants in error, speaking of the manner in which the quantity of sand used was arrived at, testifies as follows (Rec. 17, 18):

> "A. The receipts were given daily, and, at the end of each week, we rendered duplicate bills which were O.K'd by the manager of the firm, and then presented for payment weekly.

"Q. Who gave these receipts daily, as stated by you?

"A. An authorized representative of Behn, Meyer & Co.

"Q. And was this authorized representative of Behn, Meyer & Company there all the time to receive the same?

"A. Constantly; in fact he lived there on the ground.

"Q. Were you paid by Behn, Meyer & Company for furnishing these 62,000 cubic meters of sand?

"A. We were paid all except the last four receipts, which they have not as yet paid.

"Q. You were always paid according to the amount of the receipts, were you not?

"A. I was always paid—made my bills—from the receipts given to me during the week.

"Q. Before payment, would they examine the bills or receipts, or any other papers?

"A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also there another book which they always went over, and the two books always correspond—at least the receipts and their books were the same. In case there was any discrepancy in the matter of one-tenth of a meter, it was always arranged right at that moment before the bill was O. K'd by the manager.

"By the Court:

"Q. Whose book is that you are talking about?

"A. The book of their authorized representative to receive the same.

"Q. The man on the ground?

"A. The man on the ground. And each week he turned in his book before I rendered my bills."

On cross-examination, this witness testified as follows (Rec. 26-7):

"Q. . . . Now, Mr. Campbell, you stated that the sand that you put on the Behn, Meyer & Company property was measured by the representative of Behn, Meyer & Company. Did anybody representing you measure it?

"A. My man merely was there to see that the filling went on and to receive the receipts from Behn, Meyer's representative.

"Q. You had a man there as well as Behn, Meyer & Company?

"A. Yes, sir.

. . . . . .

"Q. You stated a while ago, Mr. Campbell, I understood you, that your representatives didn't measure the sand delivered, is that correct?

"A. It was not measured actually by my man, but the two men were there together. It was in charge of Behn, Meyer & Company's man.

"Q. This letter of yours, which you say is a copy of a letter written to Mr. Cook, is dated April 30, 1892. That was about more than a year closer to the time than we are now. You say there the material was measured as taken from the banca, a representative of Behn, Meyer & Company being present and checking it as delivered. Who did the measuring when Behn, Meyer & Company was there?

"A. The laborers really did the measuring, but Behn, Meyer & Company's man oversaw the work and received it, or not, as he wished.

"Q. Wasn't your man there to represent you?

"A. Yes, sir.

The witness Dittmar, manager of the plaintiffs in error, having been called on behalf of the defendants in error, testified as follows (Rec. pp. 28, 29):

"Q. Did you also bring with you, Mr. Dittmar, the memorandum book kept by your representative on that work of the sand received by him on the ground?

"A. I understand there were only loose receipts given, and they were entered afterwards in our office in the book here.

"Q. Whenever you made a payment for this sand, would you make an entry in this book?

"A. No; the entries into the big book are made either from the cash book or from the cheque book.

"Q. Then, this is a ledger, is it not?

"A. No, it is an account current.

"Q. Did you bring with you the book that showed the above payments made by you on the sand?

"A. Yes, sir, that big book contains everything.

. . . .

"Q. As the manager of Behn, Meyer & Company, did you at any time personally pay, or direct your subordinates in the office to pay, any bills for sand?

"A. Yes, sir; I did.

"Q. Before paying any bill, what books would you refer to?

"A. No books, only the receipts.

"Q. What receipts?

"A. Receipts signed by the man employed by me.

"Q. Have you these receipts sent to you by your employe?

"A. Yes, sir; he brought them over himself.

"Q. Well, have you got some of them now?

"A. Yes, they are lying there.

"Q. Who gave this book to you?

"A. I had it in the office, but I could not say who wrote it.

"Q. Why did you have this book in your office?

"A. Well, he put down according to the receipts that he had receipted for and afterwards brought the book to our office."

The witness Cercal, called by the defendants in error, testified as follows (Rec. 31-2):

"Q. Were you at any time employed by Behn, Meyer & Co.?

"A. I was employed by them.

"Q. What position did you hold in that firm?

"A. To note down in the book the sand received.

"Q. Where is that book in which you noted down the sand received on that ground?

"A. I delivered the book in the office of Behn, Meyer & Company.

"Q. I now hand you two books, and please state if either one is the book that you referred to.

"A. I commenced to make my entries on Folio 145 of this book, under the date of October 11, 1901, and the last entry made by me is at Folio 121 of another book, which is dated February 7th.

"Q. Who relieved you of this job?

"A. I don't know, because when I left there I became sick and went to the hospital.

"Q. Were you also acquainted with the man who was employed there before you?

"A. Yes, I know him by sight only, but I don't know his name.

"Q. By whose instruction did you make the entries in the book of the sand delivered?

"A. By order of Mr. Cottoncamp, and later by order of Mr. Dittmar.

. . . .

"Q. During the time you were employed there, or, in other words, during the time you kept these books in question, did you know every cubic foot of sand that you received on the ground?

"A. Yes."

The incompetency of this witness to make such measurements as were involved clearly appears from his cross-examination, and is exposed in the main brief for the plaintiffs in error, pp. 38-9; and, in passing, it may be remarked that, while this witness was the employe of the plaintiffs in error, defendants below, and was called by the defendants in error, plaintiffs below, and did not know more as respects measuring the sand than is disclosed by the foregoing extracts from his testimony, the Supreme Court below, in reversing the court of first instance, in its opinion uses this remarkable language (Rec. 102, folio 152, 103 Folio 153):

"The sand was *measured* in bancas by the agent or servant selected and paid by the defendants. . . . The defendants did not call as witnesses any of their own agents or servants, who measured this sand at the time of delivery."

How far short the record thus is of establishing an agreement by the parties upon any third person, whose determination should be conclusive upon them, is obvious, as also is the utter absence of warrant for the statement in the brief for the defendants in error (page 44).

"In the case at bar, where the persons who measured the material were appointed by the plaintiffs in error, were in their employ, and followed the method of measurement designated by them, the rule, as above stated, surely applies with the greatest force."

Respectfully submitted,

HENRY E. DAVIS,

For Plaintiffs in Error.